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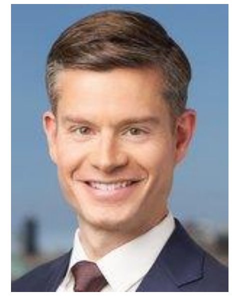
Liability Insurance Outlook For Opioid Public Nuisance Claims

By **Patrick Bedell and Allyson Spacht** (April 22, 2020)



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On April 17, the Ohio federal court overseeing over 2,700 opioid lawsuits brought by states, counties and municipalities against the pharmaceutical industry, created a new bellwether trial, Track 3. This new bellwether track is ordered to be limited to the legal theory of public nuisance.

This order follows on the heels of court-ordered Track 2 bellwether trial moving forward in West Virginia federal court on the theory of public nuisance, and the Track 1B bellwether trial in Ohio against a handful of opioid retailers (including Walgreen Co., Wal-Mart Stores Inc., CVS Health Corp. and Rite-Aid Corp.) being voluntarily narrowed to theories of public nuisance and civil conspiracy. So, why are the nation’s opioid lawsuits being narrowed in this direction, and what is the impact for insurance coverage?

As initially pleaded, the opioid lawsuits alleged a variety of claims against prescription opioid manufacturers, distributors and retailers accused of collectively creating and fueling the opioid epidemic and, therefore liable to abate the epidemic by funding social services such as addiction treatment and educational programs.

These lawsuits originally pleaded claims that included public nuisance, negligence, conspiracy, fraud, violations of the Racketeer Influenced Corrupt Organizations Act and violations of consumer protection statutes. At the heart of these claims are allegations that the pharmaceutical industry, as group, engaged in a fraudulent scheme to create a market for long-term use of prescription opioids and flood the market with such large quantities of prescription opioids that harm would have been expected to result.

However, as the suits have progressed, it has become clear that causation cannot be proven for individual injuries tied to the actions of individual defendants, particularly when the individuals themselves are not litigants in the cases and stand to recover no money directly.

For the government plaintiffs, the only means of recovering dollars is through the broad statistical analysis of generalized business sales that impact geographic economic indicators — thereby steering away from tort concepts of injury, causation, harm and the evidence needed to prove these concepts.

The opioid lawsuits are being narrowed voluntarily to focus on claims for public nuisance based on intentional business schemes.

The plaintiffs’ narrowing of their claims to focus on public nuisance is their answer to the question of how the opioid lawsuits, which seek relief for general public harm allegedly caused by a multitude of defendants, can meet the traditional requirements of the tort system.

The plaintiffs seemingly cannot prove individual harm to individual people caused by specific opioid defendants. As a result, courts either are dismissing the opioid lawsuits or allowing the cases to proceed on a theory of public harm that does not require proof of individual injury tied to the conduct of a specific defendant.

In effect, the plaintiffs are deploying statutory and common law public nuisance claims to bring their cases against the entire pharmaceutical supply chain for collectively creating and fueling the opioid epidemic. In doing so, the plaintiffs seek to alleviate their burden to fit their cases into traditional tort constructs of individual evidence and causation.

Rather, the plaintiffs rely on theories of joint and several liability and aggregate data to argue that the defendants, as a group, flooded the market with prescription opioids, and, as a result, should be collectively liable to abate the opioid epidemic by funding initiatives such as education and social programs.

So far, we have seen this strategy employed in various courts presiding over opioid lawsuits across the country, including:

- The opioid multidistrict litigation Track One bellwether cases in the federal opioid multidistrict litigation in Cleveland, Ohio (proceeding on public nuisance and civil conspiracy theories);[1]
- The opioid multidistrict litigation Track Two cases, recently remanded for trial from the opioid MDL to the U.S. District Court for the Southern District of West Virginia (proceeding on public nuisance theories);[2]
- The New York consolidated opioid litigation bellwether cases (proceeding on public nuisance theories);[3]
- The West Virginia mass litigation bellwether trial (proceeding on public nuisance theories);[4] and
- The state of Oklahoma's case against Johnson & Johnson, the first opioid lawsuit to go to trial (public nuisance theory).[5]

Courts are also limiting opioid suits to claims for public nuisance, with the opioid MDL court ordering on April 16 that a Track Three bellwether case will proceed against pharmacy defendants only on public nuisance claims.

Plaintiffs' public nuisance claims are generally premised on allegations of knowing, intentional conduct by the opioid defendants. In certain states, including Ohio, California and New Mexico, some public nuisance claims are premised on intentional conduct. In addition, certain states, including West Virginia, Arizona, Arkansas and Colorado, require that plaintiffs prove that defendants' conduct was concerted (i.e., knowing or intentional) for a finding of joint and several liability.

It has been the general strategy of opioid plaintiffs across the country to premise their public nuisance claims on allegations or evidence of intentional concerted conduct. The plaintiffs allege that "Defendants engaged in the common purpose of increasing the supply of opioids and fraudulently increasing the quotas that governed the manufacture and distribution of their prescription opioids."[6]

Notably, the plaintiffs' executive committee, the group spearheading thousands of claims in the opioid MDL, premise their claims on allegations of a fraudulent scheme by the opioid defendants to change physicians' prescribing practices and increase the supply of opioids by failing to report suspicious orders.[7]

The defendants' fraudulent scheme, the PEC asserts, is the instrumentality of the alleged public nuisance. Put another way, the PEC contends that the plaintiffs' allegations of intentional concerted conduct is what breathes life into the plaintiffs' public nuisance claims nationwide.[8]

In addition, the first opioid lawsuit to go to trial was tried to the bench on a single public nuisance count brought by the state of Oklahoma and predicated upon Johnson & Johnson's allegedly fraudulent marketing scheme. After several weeks of trial, the court ordered Johnson & Johnson to pay $465 million to fund a single year of the state of Oklahoma's abatement plan.[9] The judgment was premised upon evidence showing that Johnson & Johnson falsely marketed the nonaddictive qualities of certain opioids against the advice of its own scientific advisors.

Liability policies are not meant to cover generalized public harm.

Much like the tort system is not designed to provide a forum for claims for redress for generalized public harm, liability insurance is not designed to cover them. As an initial matter, liability insurance generally covers damages because of or for bodily injury to an individual that takes place during the policy period.

The opioid lawsuits allege economic damages premised on aggregate evidence of opioid sales and distribution, rather than injury to an individual person. In fact, as the opioid lawsuits make their way to trial, plaintiffs explicitly are disclaiming any allegations of individual injury and, instead, championing their reliance on aggregate data to satisfy their burden of proof.

Furthermore, the opioid plaintiffs seek prospective equitable abatement of the opioid epidemic, which liability policies may not insure. An award of equitable abatement to fund future public services arguably does not qualify as compensatory damages because of or for injury to a person.

In fact, some courts already have ruled that insurance does not cover generalized costs to society incurred to address the opioid epidemic because such damages are not because of or for bodily injury that is sustained by a person.[10]

Not only is equitable abatement unlikely to qualify as damages because of or for bodily injury to a person, but the funding for services that have not yet been provided, for injuries that have not yet happened, means that the plaintiffs' relief is not for injury during the policy period of any existing insurance policy.

Liability policies do not cover sums paid to address future injury. In fact, some courts hold that the payment for preventive measures or equitable relief are simply not covered damages.[11]

Do public nuisance claims allege a fortuitous event?

The allegations of intentional conduct offered in support of plaintiffs' public nuisance claims raise additional questions regarding whether such claims fall within coverage provided by liability insurance. Liability insurance provides coverage to an insured for harm caused by accidental events, rather than harm that an insured expects or intends to result from its conduct.

As the New York Court of Appeals has recognized, liability coverage is "dependent upon the happening of a fortuitous event," which is "to a substantial extent beyond the control of either party.'"[12] The concept of fortuity is a longstanding prerequisite for coverage and guards against the moral hazard that can result when an insured is covered for harm expected to result from its conduct.

Fortuity is the foundation of the recent decision by the Superior Court of California in Certain Underwriters at Lloyd's of London et al. v. ConAgra Grocery Products Company et al.,[13] in which the court ruled that a manufacturer of lead paint is not entitled to coverage for its liability to pay $101.67 million to abate the public nuisance caused by its products.

The court reasoned that California Insurance Code Section 533, which provides that an "insurer is not liable for a loss caused by the willful act of an insured," precludes coverage for "what an insured 'expected,' and the reasonable inference is [the insured] would not have spent to promote lead paint had it not expected sales, and thus damage."[14]

The insured's expectation of harm resulting from its sale of lead paint was established by the knowledge of its management and employees, including information they received from trade associations and a 1919 article reporting that lead dust is poisonous. Based on this record, the court determined that the insured "willfully promoted lead paint with knowledge of its hazards."[15]

As the insured's knowledge of the harm caused by lead paint was a central issue in the ConAgra ruling, so too may the pharmaceutical industry's alleged historical awareness of the risks of opioid abuse potentially impact coverage. For example, the opioid plaintiffs allege that Purdue Pharma LP started to sell OxyContin in 1996 and, in 2001, the OxyContin label was changed to add stronger warnings about potential misuse and Congress began to hold hearings on OxyContin abuse.[16]

The plaintiffs also allege that in 2006 and 2007, the Drug Enforcement Administration issued letters to pharmaceutical companies reminding them of their obligation to control against diversion of prescription opioids to illicit use and,[17] in 2008, two of the largest pharmaceutical distributors paid millions of dollars to resolve DEA investigations of their alleged failure to prevent opioid diversion.[18]

As the ConAgra court explained, an insured is not covered for a public nuisance that, when taking account of its employees' historical knowledge and available trade information, is expected. Similarly, allegations that pharmaceutical defendants intended to sell as many pills as possible, even as they allegedly were aware of the risk of addiction and abuse, may factor into any analysis of whether the plaintiffs allege an expected harm.

Conclusion

States, counties and cities across the country are asserting novel claims for public nuisance that seek to hold the pharmaceutical industry liable for abatement of the opioid epidemic. These claims push the bounds of tort liability by seeking to hold an entire industry liable for a social problem, without demonstrations of proof that a particular defendant caused a specific harm.

Liability insurance was not intended or priced to fund creative social policy. Nor can insurance serve as a safety net for defendants who are found liable for expected harm. The pharmaceutical defendants are alleged to have created a market for addictive narcotics and then flooded that market without ensuring that their drugs are directed to proper uses.

As the pharmaceutical industry seeks coverage for its potential public nuisance liability, it must be prepared to first explain how such liability falls within bargained-for insurance for tort claims that allege a fortuitous loss.

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[1] County of Summit, Ohio v. Purdue Pharma L.P. et al., Case No. 18-OP-45090 (N.D. Ohio) and County of Cuyahoga, Ohio v. Purdue Pharma L.P. et al., Case No. 17-OP-45004 (N.D. Ohio).

[2] City of Huntington, West Virginia and Cabell County Commission v. AmerisourceBergen Drug Corp. et al., 3L17-cv-01362 (S.D. W. Va.).

[3] In Re Opioid Litig., Index No. 400000/2017 (N.Y. Sup.Ct.).

[4] In Re Opioid Litig., Master Case. No. 19-C-9000 (W. Va. Cir. Ct.).

[5] State of Oklahoma, ex rel. Mike Hunter, Attorney General of Oklahoma v. Johnson & Johnson, et al., Case No. CJ-2017-816 (Okla. Dist. Ct.).

[6] Third Amended Complaint at ¶510, The County of Cuyahoga, Ohio et al. v. Purdue Pharma, L.P. et al., Case No. 17-MD-2804 (N.D. Ohio May 10, 2019) ECF No. 1631 ("Cuyahoga County Compl."); Third Amended Complaint at ¶526; The County of Summit, Ohio et al. v. Purdue Pharma, L.P. et al., Case No. 17-md-2804 (N.D. Ohio Mar. 21, 2019) ECF No. 1466 ("Summit County Compl.").

[7] Brief of Plaintiffs' Executive Committee in Response to Defendants' Brief Concerning Statue Nuisance Law at 11-12, In Re Nat'l Prescription Opioid Litig., Case No. 17-md-2804 (N.D. Ohio Apr. 5, 2019) (ECF No. 1525).

[8] Id. at 13.

[9] State of Oklahoma, ex rel. Mike Hunter, Attorney General of Oklahoma v. Johnson & Johnson, et al., Case No. CJ-2017-816 (Okla. Dist. Ct. Aug. 26, 2019).

[10] See Acuity v. Masters Pharmaceutical, Inc., No. A1701985 (Ohio Ct. Com. Pl. 2019) (Feb. 7, 2019); Travelers Prop. Cas. Co. of Am. v. Anda, Inc., 90 F. Supp. 3d 1308, 1314 (S.D. Fla. 2015), aff'd on other grounds, 658 F. App'x 955 (11th Cir. 2016); Cincinnati Ins. Co. v. Richie Enterprises LLC, No. 1:12-CV-00186-JHM, 2014 WL 3513211 (W.D. Ky. July 16, 2014). But see Cincinnati Ins. Co. v. H.D. Smith, LLC, 829 F.3d 771 (7th Cir. 2016); Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co., 410 F. Supp. 3d 920 (C.D. Ill. 2019), appeal docketed, Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co., No. 20-1020 (7th Cir. Jan 3, 2020).

[11] See Ellett Bros. Inc. v. United States Fidel. & Guar. Co., 275 F.3d 384, 387-88 (4th Cir. 2001); Boeing Co. v. Aetna Cas. & Sur. Co., 784 P.2d 516 (Wash. 1990); Bellaire Corp. v. Am. Empire Surplus Lines Ins. Co. et al., 115 N.E. 3d 805, 812 (Ohio Ct. App. 2018)

[12] Consolidated Edison Co. of New York, Inc. v. Allstate Ins. Co., 98 N.Y.2d 208, 220 (N.Y. 2002) (quoting Insurance Law §1101(a)(1)).

[13] Case No. CGC-14-536731 (Cal. Super Ct.) (Feb. 26, 2020).

[14]ConAgra, Case No. CGC-14-536731 at 6-7.

[15]Id. at 3.

[16]Summit County Compl. at ¶¶ 47, 160, 195-196, 576; Cuyahoga County Compl. at ¶¶ 42, 119, 148, 183-84, 558.

[17]Summit County Compl. at ¶¶ 524-525; Cuyahoga County Compl. at ¶¶ 508-509.

[18]Summit County Compl. at ¶¶ 797(f), 798; Cuyahoga County Compl.at ¶¶ 843(f), 844.